Supreme Court, U.S.
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No. 01-981

IN THE

Supreme Court of the United States

WARD S. LARKIN,

Petitioner,

v.

COMPUSA, INC. AND MICHAEL JOHNSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTEENTH COURT OF APPEALS OF TEXAS

BRIEF IN OPPOSITION FOR RESPONDENT CompUSA, Inc.

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QUESTION PRESENTED

The only question presented is whether the Texas courts properly determined, as a matter of Texas law, that Michael Johnson was acting within his authority as a Texas peace officer when he arrested Ward S. Larkin, and not as an employee or agent of CompUSA, Inc.

STATEMENT PURSUANT TO RULE 29.6

Respondent CompUSA, Inc. is a privately held corporation. The following are its parent companies which are each publicly held and which each own or control 10% or more of the stock of CompUSA, Inc.: Grupo Carso, S.A. de C.V., Grupo Sanborne, S.A. de C.V., SBC Communications, Inc., Carso Global Telecom, S.A. de C.V. and America Movil, S.A. de C.V. Upon conclusion of a pending transaction, U.S. Commercial Corp., S.A. de C.V. will also have a 10% or more stock ownership interest in CompUSA, Inc.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of Jurisdiction	1
Counter-Statement of the Case	1
Reasons for Denying the Writ	4
A. The decision of the Texas appellate court is based on an independent state ground that is adequate to support the judgment.	4
B. The decision below was correct.	9
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Blackwell v. Harris County, 909 S.W.2d 135 (Tex. App. – Houston [14th Dist.] 1995, writ denied) ... 4, 6

City of Dallas v. Half Price Books, Records, Magazines, Inc., 883 S.W.2d 374 (Tex. App. – Dallas 1994, no writ) 9

Glenmar Cinestate, Inc. v. Farrell, 292 S.E.2d 366 (1982) 6, 7, 8

Leake v. Half Price Books, Records, Magazines, Inc., 918 S.W.2d 559 (Tex. App. – Dallas 1996, no writ) 9

Mellon v. O'Neill, 275 U.S. 212, 48 S. Ct. 62, 72 L. Ed. 245 (1927) 8

Murdock v. Memphis, 87 U.S. 590, 22 L. Ed. 429, 20 Wall. 590 (1874) 8

Constitutions and Statutes:

TEX. PEN. CODE § 42.01 9

TEX. CODE CRIM. PROC. art. 2.13 5

STATEMENT OF JURISDICTION

No jurisdiction exists in this Court. The decision of the Fourteenth Court of Appeals of Texas was based on an independent state ground that is adequate to support the judgment. The Texas Supreme Court refused to consider this case. Further, no federal question was raised and decided in the Texas courts.

COUNTER-STATEMENT OF THE CASE

Ward S. Larkin ("Larkin") brought suit against CompUSA, Inc. ("CompUSA") seeking to hold CompUSA vicariously liable for intentional torts allegedly committed by Harris County Deputy Sheriff Michael Johnson ("Johnson") arising from Larkin's arrest outside a CompUSA store on September 17, 1996. (Cl. R. at 2-6). As a "side-job," in addition to his full-time employment as a Harris County Deputy Sheriff, Johnson had been retained by CompUSA to work in his off-duty hours providing security for CompUSA. (*See generally* Cl. R. at 161-215.) Johnson wore his official uniform while working the assignment. (Cl. R. at 165, 187, 199). Johnson had sought and obtained the approval of the Harris County Sheriff's Office to work for CompUSA in this capacity. (Cl. R. at 162-164).

On the afternoon in question, Johnson stood near the front door of the CompUSA store, checking receipts of customers as they left the store, confirming that the goods being taken out had been paid for, and marking the receipts after inspection. (Cl. R. at 164). Larkin visited the CompUSA store on that same day to purchase a mouse for a laptop computer. (Cl. R. at 199). Larkin purchased the mouse from a customer service representative. *Id.* After making the sale,

the customer service representative instructed Larkin to show the receipt for the merchandise purchased to the man at the door, indicating Johnson. *Id.*

Larkin testified that he then walked over to Johnson and held the receipt a couple of inches below the deputy's eye level. *Id.* Johnson tried to take the receipt out of Larkin's hand and began to mark it with a highlighter pen. (Cl. R. at 167, 187, 199-200, 207). Larkin became offended and immediately pulled the receipt back out of Johnson's hand. (Cl. R. at 167, 187-188, 200). As Larkin pulled his hand away he exclaimed in a loud voice, "What the hell are you doing?"[1] *Id.* Johnson responded with a puzzled "excuse me," and Larkin once again exclaimed the query, "What the hell are you doing?" in what Johnson believed to be a loud, disruptive manner and in the presence of other customers. (Cl. R. at 168, 171, 175).

As Larkin started to exit the store, Johnson identified himself as a peace officer and ordered Larkin to stop. (Cl. R. at 170-172, 191-192, 201). After a brief conversation with Johnson in the vestibule of the store, Larkin again turned away from Johnson and walked out an automatic sliding door onto the sidewalk in front of the store. (Cl. R. at 171-174, 191-192, 201). Johnson again ordered Larkin to stop. *Id.* Larkin did not comply. *Id.* At this point, Johnson again identified himself as a peace officer, stating that he was a Harris County Deputy Sheriff, and again ordered Larkin to stop. *Id.* Larkin nevertheless continued to walk away. *Id.* Larkin remembers that Johnson stated: "***I am ordering you as a Harris County Deputy Sheriff to come back here.***" (Cl. R. at 192) (emphasis added). Rather than comply

1. In his report generated contemporaneously with the incident Johnson stated that Larkin addressed him as a "mother-fucker" (Cl. R. at 167). Larkin himself alleges that Johnson was of this opinion on the date of the incident (Cl. R. at 3-4).

with this command, Larkin responded: "If you want me to stay here, you will have to arrest me." (Cl. R. at 173, 192). Larkin then turned away. *Id.*

Johnson caught up with Larkin by the time Larkin reached his car and arrested him for disturbing the peace and for evading detention. (Cl. R. at 170-174). Johnson subsequently had Larkin transported to the Harris County jail system. (Cl. R. at 174-175, 202). Larkin admitted that he was aware that Johnson was a sheriff's deputy, rather than a security guard, when Johnson identified himself as such. (Cl. R. at 191-192, 201).

Larkin filed suit in the 133rd Judicial District Court of Harris County, Texas against Johnson and CompUSA alleging false imprisonment, battery, malicious prosecution, and intentional infliction of emotional distress against Johnson, and *respondeat superior* as to CompUSA. (Cl. R. at 2-5).

The Trial Court granted summary judgment to CompUSA. (Cl. R. at 258). The Court of Appeals affirmed the summary judgment in favor of CompUSA, stating,

> There is no contention that Johnson enforced any CompUSA policy or advanced CompUSA's interests when he went outside and arrested a paying customer. Thus, there is no issue of material fact about whether Johnson was acting as an employee of the Harris County Sheriff's office when he arrested a person who refused to comply with the officer's attempt to detain him.

(Petition for Writ at App. 2–3).

REASONS FOR DENYING THE WRIT

A. The decision of the Texas appellate court is based on an independent state ground that is adequate to support the judgment.

Larkin claims CompUSA is vicariously liable for Johnson's alleged intentional torts because Johnson was CompUSA's contract employee. Summary judgment was granted to CompUSA by the Trial Court and affirmed by the Fourteenth Court of Appeals based on the courts' finding as a matter of Texas law that Johnson acted within his authority as a peace officer when he arrested Larkin. (Petition for Writ at App. 1-6).

In its decision, the Fourteenth Court of Appeals cited *Blackwell v. Harris County,* 909 S.W.2d 135, 139 (Tex. App. – Houston [14th Dist.] 1995, writ denied):

> *Blackwell* explains that where an officer is performing a job incident to enforcing the public laws, he is acting in the course and scope of his employment as a police officer even if the private employer directed him to perform the duty.

(Petition for Writ at App. 1-6). After considering Johnson's objective actions, the Court concluded:

> We find Johnson proved as a matter of law that he acted as a Harris County Deputy Sheriff rather than as an employee of CompUSA.

(Petition for Writ at App. 1).

Under Texas law, whether Larkin committed a crime has no bearing on Johnson's capacity at the time Johnson arrested Larkin. Larkin's argument that the Court of Appeals failed to

apply this Court's fighting words analysis when the Court affirmed the decision of the Trial Court is based on the false premise that in order to affirm summary judgment on behalf of CompUSA, the Appellate Court was required to find that Larkin had committed the crime of disorderly conduct.

Larkin admits that the Court of Appeals did not address the Fighting Words Doctrine, yet Larkin argues that, in affirming the summary judgment, the Court held by default that Larkin's statement, "What the hell are you doing?" constituted fighting words. (Petition for Writ at 8). Larkin is incorrect. The Court of Appeals did not address the Fighting Words Doctrine because whether Larkin's statement met the criteria for fighting words was not at issue.

Johnson arrested Larkin in connection with performing his public duties of enforcing substantive criminal law as Johnson understood it and not for any purpose related to CompUSA, regardless of whether Larkin committed either the offense of evading arrest or the offense of disorderly conduct. Larkin has asserted the proposition that the *only* time a peace officer acts in the capacity of a peace officer as a matter of law is when a crime has been committed in the officer's presence. However, this proposition is wholly inconsistent with the language of one of the principal Texas statutes governing the duties and powers of peace officers, which states:

> It is the duty of every peace officer to ***preserve the peace*** within his jurisdiction. To effect this purpose, he shall use all lawful means. He shall in every case where he is authorized by the provisions of this Code, ***interfere without warrant to prevent or suppress crime***.

TEX. CODE CRIM. PROC. art. 2.13 (emphasis added). This provision places a clear duty on peace officers to prevent and

suppress crime, rather than merely react to crime when it occurs. It follows that the scope of Johnson's authority as a public law enforcement agent, and the range of actions undertaken in the capacity of law enforcement agent, are much broader than Larkin suggests. *See Blackwell*, 909 S.W.2d 135.

As referenced above, the Fourteenth Court of Appeals pointed to *Blackwell* in its opinion. The *Blackwell* court held that an officer was acting within the scope of his employment as a law enforcement officer in directing traffic while escorting a funeral procession as a side-job in his off-duty hours. *Blackwell*, 909 S.W.2d at 137. In articulating the test applied to make this determination, the *Blackwell* court explicitly adopted the test employed by the Supreme Court of Virginia in *Glenmar Cinestate, Inc. v. Farrell*, 292 S.E.2d 366 (1982). The *Glenmar* test turns on one basic inquiry: "In what capacity was the officer acting at the time he committed the acts for which the complaint is made?" *Blackwell*, 909 S.W.2d at 139 (*citing Glenmar*, 292 S.E.2d at 369-70). Quoting the standard applied by the *Glenmar* court, the *Blackwell* court stated:

> If [the officer] is engaged in the performance of a public duty such as the enforcement of general laws, his [private or temporary] employer incurs no vicarious responsibility for his acts, even though the employer directed him to perform the duty. On the other hand, if he was engaged in the protection of the employer's property, ejecting trespassers or enforcing rules and regulations promulgated by the employer, it becomes a jury question as to whether he was acting as a public officer or as an agent servant of employer. [sic]

Blackwell, 909 S.W.2d at 139.

In *Glenmar*, the court considered whether an off-duty deputy sheriff was the agent or employee of the owner of a drive-in movie theater while working a side-job directing traffic in and out of the theater parking lot. *Glenmar*, 292 S.E.2d at 367. The plaintiff sought to hold the theater owner vicariously liable for the deputy's allegedly negligent misdirection of traffic, which had allegedly caused an accident in which the plaintiff had been injured. The court concluded that the officer's actions in directing traffic could not, as a matter of law, give rise to vicarious liability for the owner of the drive-in, stating:

> [A] special police officer appointed by public authority, but employed and paid by a private party, does not subject his employer to liability for his torts when the acts complained of are performed in carrying out his duty as a public officer.

Glenmar, 292 S.E.2d at 369. The court found that in directing traffic out of the theater, the deputy was "engaged in the performance of a public duty." *Glenmar*, 292 S.E.2d at 370. The court took particular note of the fact that even though the deputy took some direction concerning his job from the theater management, he acted on his own initiative and was self-directed and "chose his own methods" in undertaking the actions that formed the basis of the plaintiff's complaint. *Glenmar*, 292 S.E.2d at 369.

The circumstances surrounding Johnson's actions are virtually identical to those in *Glenmar*. Like the deputy in *Glenmar*, Johnson was a uniformed Sheriff's Department law enforcement officer working a side-job for a private employer in his off-duty hours. Furthermore, like the deputy in

Glenmar, at the time he performed the actions of which Larkin complains, Johnson was acting without any direction from CompUSA as to whether to make the arrest or the manner in which this task should be carried out. (Cl. R. at 177). Johnson had received specialized training in the procedures to be employed in making arrests, which he followed in arresting Larkin. (Cl. R. at 172-173). Indeed, it was Larkin himself who invited Johnson to arrest him, defiantly refusing to stop unless Johnson did so. (Cl. R. at 173, 192).

Clearly, the Fourteenth Court of Appeals based its decision on independent and adequate state court grounds and therefore, this Court lacks jurisdiction in this matter. *Murdock v. Memphis*, 87 U.S. 590, 22 L. Ed. 429, 20 Wall. 590 (1874). The Fourteenth Court of Appeals determined no federal question in deciding this case. In this context, this Court stated the following:

> It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court.

Mellon v. O'Neill, 275 U.S. 212, 48 S. Ct. 62, 72 L. Ed. 245 (1927).

B. The decision below was correct.

The Court of Appeals appropriately confirmed the Trial Court's summary judgment in favor of CompUSA on the grounds that at the time Johnson arrested Larkin for disturbing the peace and evading detention, Johnson was acting in the capacity of an on-duty police officer and, therefore, as a matter of law, not as CompUSA's employee or agent. (Petition for Writ at App. 1-6). *See, e.g., City of Dallas v. Half Price Books, Records, Magazines, Inc.*, 883 S.W.2d 374 (Tex. App. – Dallas 1994, no writ); *Leake v. Half Price Books, Records, Magazines, Inc.*, 918 S.W.2d 559 (Tex. App. – Dallas 1996, no writ). For this reason, CompUSA cannot be held vicariously liable for any intentional torts committed by Johnson.

Larkin's chief argument that the appellate court improperly affirmed the trial court's summary judgment is: (1) Larkin's repeated exclamations challenging Johnson's authority do not qualify as "Disorderly Conduct" within the meaning of TEX. PEN. CODE § 42.01; and (2) Johnson had no probable cause to arrest Larkin without a warrant. (Petition for Writ at 12-20). Notwithstanding Larkin's assertions — on the *undisputed* facts of this case, Larkin made public exclamations containing profanity in a loud and disruptive manner within sight and earshot of other store customers. (Cl. R. at 168, 171, 175). It is equally clear that Larkin repeatedly and knowingly refused to comply with the direct orders of a uniformed Harris County Deputy Sheriff, and literally invited the officer to arrest him. The uncontroverted facts of this case compel the conclusion that Johnson was acting in his capacity as a law enforcement officer *whether or not* any crime was actually committed under the technical statutory definitions.

Johnson was performing a task that involved approaching a suspect, handcuffing the suspect and remitting that suspect to the appropriate detention facilities for the jurisdiction in which Johnson had law enforcement authority. These actions are quintessential examples of actions taken in the capacity of a law enforcement agent, irrespective of the validity of the arrest or the ultimate supportability of the charges against Larkin. For this reason, it simply makes no sense to attribute any of these actions to CompUSA for the purposes of vicarious liability, and it makes even less sense to adopt Larkin's position that whether Johnson's actions can be attributed to CompUSA should somehow turn on whether Johnson properly interpreted and applied the penal laws that he understood at the time of the arrest.

CONCLUSION

For the foregoing reasons, CompUSA respectfully requests that this Honorable Court deny the petition.

Respectfully submitted,

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